IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.1557 OF 2001

Tahira Industries (India) Pvt.Ltd.,
a company incorporated under
Indian Companies Act, having their
registered office at 19/21,
Manohardas Street, Opp.General
Post Office, Mumbai-400 001. ...Petitioners

Versus

1.Jagannath Ramdayal Yadav
alias Jagannath Ramdhilal,
residing at Tahira Industries
Compound, Caves Road, Jogeshwari,
Mumbai.

2.Deleted

3.Shivkaran Musai Pasi
for himself and as Constituted
Attorney of Obstructionists in
Bombay City Civil Court Suit
No.6937 of 1970, residing at
Jagannath Yadav Chawl,
Tahira Compound, Jogeshwari (E),
Mumbai. ...Respondents

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Mr.K.D.Shah for Petitioner.

Ms.Prachi Tatke i/b Mr.R.A.Thorat for Respondent No.1.

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CORAM: A.M.KHANWILKAR, J.

JANUARY 9, 2007.

ORAL ORDER :

1. This Revision Application takes exception to the Judgment and Order passed by the City Civil Court, Bombay dated 15th June 2001 in S.C.Suit No.6937 of 1970. The Petitioners/Plaintiffs had filed Suit in the year 1971 for declaration and possession against the Defendants. From the Roznama, it is seen that the hearing of the Suit was adjourned from time to time and eventually, it was ordered to be kept for ex-parte decree in terms of order dated 21st June 1983, as the Defendants had failed to file written statement till that date. The Suit was accordingly notified on 6th July 1983 but the Board was discharged by the concerned Judge. It was then placed for hearing on 22nd July 1983 when the Court proceeded to pass decree against the Defendants under Order VIII Rule 5(2) of the Code of Civil Procedure. The Plaintiffs put the said decree to execution, which however, was obstructed by 97 third parties on 21st February 1985. For removing obstruction Plaintiffs have taken out appropriate applications before the Executing Court. The third parties have filed substantive suits against the Plaintiffs to protect their possession. Those proceedings are pending

before the lower Court and are ordered to be heard together. We are not concerned with those proceedings. The present Revision, however, arises out of the order passed by the lower Court on 15th June 2001 below Notice of Motion No.621 of 2001 taken out by the Defendant No.1 for setting aside the ex-parte decree passed against him. This Application has been allowed by the Trial Court which Judgment and Order is subject matter of challenge in the present Revision Application.

2. The Trial Court has essentially noted that, ex-parte decree passed, was the mistake of the Court- as it had overlooked that the Defendant had already filed written statement which was found in the proceedings of the Court with endorsement of the Sheristedar thereon. In other words, the Court invoked its inherent power *ex debito justitiae* to show indulgence to Defendant No.1 and proceeded to set-aside the ex-parte decree passed as back as on 22nd July 1983.

3. After hearing Counsel appearing for the parties and closely examining the record and the

pleadings, I have no hesitation in taking the view that the Court below has clearly exceeded its jurisdiction in allowing the Notice of Motion filed by the Defendant No.1 for setting-aside the ex-parte decree. In the first place, the Court below has not even adverted to the fact as to whether the Defendant No.1 had made out sufficient cause for the delay of over 18 years in taking out application for setting-aside ex-parte decree. As is noted earlier, ex-parte decree was passed on 22nd July 1983. The affidavit filed on behalf of the Defendant before the lower Court in support of the application for setting aside ex-parte decree admits the fact that the Defendant No.1 became aware about the ex-parte decree at least in the year 1998. The only explanation that can be discerned from the affidavit is from Para 11 to 13 thereof which reads thus :

> "11. That thereafter in the year 1998, I sent my son Ramshankar Yadav to collect the rent from my tenants, when some of the tenants refused to pay rent and after filing suits against tenants one of the tenants Mr.Gurdev Singh Dilip Singh filed his reply informing the ex-parte order passed in the above suit and in fact challenged my title.

> 12. That again as per information of my son Ramshankar Yadav, I again came down to Mumbai in the month of August, 1999 and tried to contact my previous Advocate Mr.Gupta, but I was informed that he expired in the year 1985. Further as all the case papers were given to another Advocate as introduced by Mr.Jayantilal Shah, whose address is now not traceable by me, hence I applied for certified copy of the entire proceedings in the month of September, 1999. That thereafter, I again fell seriously ill and was under treatment of my family doctor and again went to my native place as per advice of my doctor. I crave leave to refer to an rely upon medical certificate as and when produced.
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> 13. I say that recently in the month of December, 2000 I came down to Mumbai and contacted presented Advocate and I have taken out this Notice of Motion for setting aside ex-parte order."

4. As mentioned earlier, the Defendant has admitted that he acquired knowledge of the ex-parte decree at least in the year 1998. Assuming that the knowledge was acquired at the end of 1998, there is absolutely no explanation as to why the Defendant did not take any positive steps immediately thereafter. All that has been mentioned in Para 12 is that the Defendant again came down to Mumbai in the month of August 1999 and tried to contact his advocate and had to go back to his native place in September 1999 where he fell seriously ill and was advised rest by his family

doctor at his native place. The Defendant could find out time to visit Mumbai only in December 2000. There is not even a suggestion in the affidavit that during September 1999 till December 2000 the Defendant was completely immobilised and was required to stay back at his native place and was suffering such ailment that he was not able to communicate even with his son who was in Mumbai during the relevant period so as to diligently pursue the proceedings. This aspect has been completely overlooked by the lower Court. While addressing this aspect in Para 2, of the impugned Judgment, all that the lower Court observes is that the Defendant No.1, because of his old age and ailing health was unable to attend the matter with promptitude. The lower Court then proceeds to hold that as the Plaintiffs had played fraud on the Court and snatched ex-parte decree from the Court, the Defendant should be shown indulgence. This approach, to say the least, is unacceptable. The Court in the first place should have positively found that Defendant was throughout diligent in pursuing the proceedings at the stage of the trial of the suit and even after the decree was passed in

July 1983. Unless that finding was to be recorded in favour of the Defendant, the Court could not have assumed jurisdiction to show indulgence to the Defendant in setting aside decree after lapse of 18 years, ex-parte though.

5. In any case, the basis on which the lower Court has assumed that the Plaintiffs have played fraud and snatched ex-parte decree from the Trial Court, is completely erroneous. The fact that the copy of the written statement has now been traced in the proceedings and it contains noting of the Sheristedar of having been tendered, cannot be the basis to assume that the Plaintiffs had played fraud on the Court. The Plaintiffs as well as the Court were expected to proceed on the basis of the Roznama recorded from time to time. The accuracy of the Roznama has not been put in issue by the Defendant. From the Roznama, it is more than evident that from 23rd November 1972, the Suit was adjourned from time to time on several dates. In fact, Court Receiver was appointed in respect of the suit property. The Defendants and their Advocate remained absent on most of the dates.

Interestingly, the Defendants were represented before the Trial Court by Advocate K.K.Vyas and K.V.Gupta on 12/12/1972, 12/11/1973 and 10/05/1977. On the subsequent dates, the Advocates as well as the Defendants remained absent. The Court showed indulgence and adjourned the hearing of the Suit on 29/11/82, 20/12/82, 21/12/82, 31/1/83, 17/3/83, 22/3/83, 12/4/83, 21/6/83, on which date, eventually the Court placed the Suit for hearing under caption 'for ex-parte decree'. The Suit was accordingly notified on 6th July 1983 and adjourned to 22nd July 1983 as the board was discharged. On 22nd July 1983 the Court proceeded to pass ex-parte decree under Order VIII Rule 5(2) of the Code of Civil Procedure, 1908. The Court has clearly recorded that written statement was not filed on behalf of the Defendant, though indulgence was shown to the Defendant to comply with that requirement.

6. Besides, from the Roznama dated 31/01/1983, it is seen that there was another suit pending between the same parties and that the Defendants were represented by the same Advocates

in that suit. From the Roznama dated 12/04/1983, it is noticed that the Advocate for Defendants was present in Court. Defendant No.2 was present in-person in Court. The Advocate informed that he was unable to trace Defendant No.1 at his residence. The Defendant No.2 on the other hand stated that the first Defendant had left for Dahisar. The Defendant No.2 took time to engage Advocate and file written statement, when the Court made it clear that no further indulgence will be shown. From Roznama, it is more than clear that at no point of time, the concerned Judge had knowledge about presentation of the written statement at the instance of Defendant No.1 on 9th February 1971, as is asserted in the present proceedings. The assertion is not consistent with the contents of Roznama.

7. In other words, the Court below has wrongly assumed that the Plaintiffs were responsible for inviting ex-parte decree or for that matter committed fraud and snatched ex-parte decree from the Court. The fact that some endorsement appears on the written statement, which

has now been traced from the proceedings maintained in the Court, can be of no avail to the Defendant No.1. The written statement, if it was presented, in ordinary course of business, the Court would have taken the same on record and referred to that fact in the Roznama. This is not what has happened in this case. Besides, if the Defendant No.1 had in fact filed the written statement to be taken on record by the Court and the same was not so taken on record, would have definitely made grievance before the Trial Judge at least till the matter was contested by him till 12th November 1973. No such grievance at any point of time was made before the Trial Court - about the fact that written statement was already filed on behalf of Defendant No.1; nor any steps were taken to correct the proceedings (roznama) of the Court. It is too much to now blame the Plaintiffs and also attribute motives to the Plaintiffs of having misled the Trial Court and of snatching ex-parte decree against the Defendant No.1. Interestingly, the Defendant No.2 has not challenged the ex-parte decree passed against him. If it was a case of fraud played upon Court, the Defendant No.1 would surely have had rushed to the Court immediately on acquiring knowledge about ex-parte decree in 1998 itself. In my opinion, the reason which weighed with the Trial Court for

showing indulgence to the Defendant No.1 is completely misplaced. The Court below has committed manifest error in allowing the Notice of Motion on accepting the plea that it was a case of fraud played on the Court, which plea was unsubstantiated.

8. Counsel for the Defendants placed reliance on the full Bench decision of the Allahabad High Court in the case of **Abdul Rashid v.Sri Sitaramji Maharaj Brajman & Ors. reported in AIR 1974 All. 275**. Indeed, if it is a case of inadvertent

error by Court, it is bounden duty of the Court to correct such mistake *ex debito justitiae*. However, in the fact situation of the present case, it is not possible to entertain such grievance. In the first place, the grievance can be looked into only if the Defendant No.1 was found to be diligently pursuing his remedy. Going by his own version, it is obvious that he had acquired knowledge in 1998; whereas, the Notice of Motion was filed on 18th January 2001, to set-aside ex-parte decree passed almost 18 years back. The exposition in the said decision therefore will be of no avail to the Defendant No.1. It is only if the Court was to find that the Defendant No.1 had made out sufficient cause, the question of showing indulgence in examining the contention on merits of the controversy at the instance of Defendant No.1 would arise and not otherwise.

7. Accordingly, this Revision should succeed. The impugned Judgment and Order is therefore set-aside and instead, the Notice of Motion No.621 of 2001 is ordered to be dismissed with costs. Ordered accordingly.

A.M.KHANWILKAR, J.